Fifth Circuit, commanding the said Court to certify and to send to this Court, in due course, all matters essential to a consideration of the questions presented by this cross-petition had in the case entitled on its docket John C. Getz et al., appellants, v. Town of Belleair. appellee, No. 9850, to the end that said cause may be reviewed and determined by this Court, as provided by the Statutes of the United States, and that the judgment of said Circuit Court of Appeals be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated at Tampa, Florida, this 8th day of September, 1941.

O. K. REAVES
Tampa, Florida
Counsel for Cross-Petitioner.

BRIEF IN SUPPORT OF CROSS-PETITION FOR WRIT OF CERTIORARI

Opinions Below

Olds v. Town of Belleair, (5 Cir.) 120 F. (2) 492 (reported in Advance Sheet of July 21, 1941); *Getz v. Town of Belleair,* (5Cir.) 120 F. (2) 494 (reported in Advance Sheet of July 21, 1941).

Concise Statement of the Grounds on Which Jurisdiction Is Invoked

Jurisdiction is invoked upon the grounds that the United States Circuit Court of Appeals has refused to observe and follow decisions of the Florida Circuit and Supreme courts upon a question of fact therein litigated and finally adjudicated and has directed the District Court of the Southern District of Florida to retry and

relitigate said question. The particular question and the manner in which it arose are set forth and explained under the heading "Short Statement of Matters Involved" in the preceding cross-petition (pp. 2-8, inc.) and are, therefore, not amplified here.

A Concise Statement of the Case

The statement in the petition (pp. 2-8, inc.) contains all that is material to a consideration of the questions presented, with appropriate page references to the printed record indicated by the symbol "R", and, to be concise, we refrain from repeating.

Specifications of Errors

The Circuit Court of Appeals erred:

(1) In reversing the District Court;

(2) In remanding the cause for the trial by the District Court of a question of fact which had been tried and decided in the State courts; and

(3) In holding that the decree of the State Circuit Court of March 12, 1940, in *Olds et al v. Alvord et al.* superseded the previous finding and adjudication of that Court and of the Supreme Court that the proceeds of the bonds in question had been used for private purposes and not for the public purposes of the Town of Bellair.

Argument

The opinion of the Circuit Court of Appeals seems to concede

(1) That a question of fact once put in issue, litigated, and decided by a court of competent jurisdiction cannot be re-examined in another court (the Florida

Court has repeatedly so held—*Gaines v. Russ,* 60 Fla. 317, 53 So. 113; *Torrey v. Bruner et al.,* 60 Fla. 365, 53 So. 337; *Connor et al. v. Elliott,* 73 Fla. 217, 74 So. 649; *Hay v. Salisbury,* 92 Fla. 446, 109 So. 617; *Gray v. Gray,* 91 Fla. 103, 107 So. 261), and

(2) That the Florida Circuit and Supreme courts, with the issue before them, had determined that the proceeds of the $300,000 bond issue (of which the bonds of Getz et al. are a part) had been used by the Town for the benefit of individuals and private corporations and not for the public purposes of the Town, but it says that at the very last state of that litigation—to wit, in the judgment of the Circuit Court rendered pursuant to the final mandate of the Supreme Court—

> ". . . the issue as to the private object and use of proceeds of these bonds dropped out of the case and was unnecessary to be considered and was in fact not decided in this final decree."

If we concede that it was not decided ". . . *in this final decree,*" it is true, nevertheless, that the question had been decided, and that decision was not revoked or altered by the said so-called "final decree". Neither the Circuit nor the Supreme court receded from, altered, or modified any question of fact which had been found in the course of litigation in relation to this bond issue; the only change was upon a question of law. After finding the underlying facts—namely, that the bonds were issued and the proceeds used for the benefit of private corporations and not for municipal purposes—the Court first concluded as a matter of law that no tax could, therefore, be levied or collected to pay them, in view of Section 7, Article IX, of the State Constitution. It later changed its opinion of the law as related to the paving bonds and concluded that, notwithstand-

ing they had been issued and the proceeds used for the benefit of private corporations, the taxpayers had overslept their rights by not raising the question in the proceedings to validate the bonds, and that, because of the validating decrees, the said paving bonds must be upheld; but, as to the "Public Improvement Bonds" here involved, the Court did not even change its opinion of the law, because it said the Town had no power to issue bonds at the time they were floated, and hence the validating decree did not save them, and, therefore, affirmed the decree of the lower court as to said bonds. In other words, the sole change of opinion by the Florida court was as to the legal effect of the validating decrees. The decree of the State Circuit Court, pursuant to the mandate of the Supreme Court, superseded the prior final decree as to the part of such other decree which had been reversed, but it had no effect upon that part which had been affirmed. Indeed the lower court was powerless to make any further decree which would affect that part of its former decree which the Supreme Court had affirmed. Moreover, the statement in the final opinion of the Supreme Court that

> "It so happens that the proceeds of this $300,000 issue was used for building a sea wall and making other improvements which were chiefly beneficial to a private corporation"

shows that it had no intention of taking back its previous positive finding (170 So. 434) that the proceeds had been used for the purpose of improving property of private corporations, but, on the contrary, reaffirms that finding. Neither does it have the effect of reversing or in any manner modifying the finding of the lower court in his decree that

"All of said bonds were issued and the proceeds

> thereof used for the primary object of benefiting the property of either Belleair Estates, Inc. or Bellevue-Griswold Hotel Company, or both," etc. (R. 46),

or the amplified finding of the lower court on that question set out in his opinion (R. 63 et seq.).

Judge Sibley, in the above quotation, says the issue as to the private object and use of the proceeds of these bonds "was unnecessary to be considered and was, in fact, not decided in this final decree." Conceding, for the purpose only of answering this suggestion, that the Florida court might have disposed of the $300,000 bond issue by simply saying that the Town had no power to issue bonds and, in the absence of power to issue them, there was no jurisdiction to validate under the validation statute, the answer is that the case was not disposed of in that manner. Nor did the pleadings so restrict the issues. The use of the proceeds was brought in direct issue by the pleadings, and the Court had the right to pass upon all the grounds presented, and did pass upon the particular question as to how the proceeds were used. The rule of law does not go so far as to make it absolutely necessary to pass upon a given question, but

> "A fact or question which was actually and directly in issue in a former suit, and was there judicially passed upon and determined by a domestic court of competent jurisdiction, is conclusively settled by the judgment therein," etc.,
> 34 C. J., p. 868.

The essential elements stated appear in this case.

That Getz and his associates were parties to the proceedings in the State court as members of a class—to wit,

the class of bondholders to which Olds and Newberry (who appeared and defended in that suit) belonged—and that they were properly sued and bound as such were specifically found by the District Court (R. 147-8) and not controverted by the Circuit Court of Appeals. Moreover, we have quoted the Florida statute about class suits and amplified this point as related to Mr. Getz and his associates in our brief herein opposing their application for writ of certiorari, to which reference is hereby made if the Court desires to further examine that question. We, therefore, refrain from repeating here what we have there said except to call the Court's attention to the recent case of

Hansberry et al. v. Lee et al., 61 S. Ct. 115, (Advance Sheet of December 1, 1940).

wherein this Court holds that class suits are binding upon absent members of the class, and that, unless State procedure has denied the due process of law guaranteed by the Federal Constitution, the federal courts are bound thereby, and we have shown in our amplified argument above referred to that Getz and his associates did belong to the same class, because their bonds were identical with bonds held by Olds and Newberry, who defended the suit in the State court, and that the relief sought in said suit was to enjoin the levy of a tax upon the property in the Town to pay all bonds of the said issue. There is a clear distinction between an action against individual bondholders for the purpose of the cancellation of individual bonds or to enjoin the payment of individual bonds and an action to enjoin the collection of a tax to pay all bonds of a given issue, which is quasi in rem and affects alike all bonds of the stated issue.

It is, therefore, respectfully submitted that the Cir-

cuit Court of Appeals ignored the binding effect of the judgment of the Florida courts and has directed the District Court to proceed contrary thereto, in violation of the law as declared by this Court in

Erie Railroad v. Tompkins, 304 U. S. 64, 58 S. Ct. 817;

Vandenbark v. Owens-Illinois Glass Co., 61 S. Ct. 347, (Advanced Sheet of January 15, 1941).

and similar cases.

Wherefore, writ of certiorari, as prayed, ought to be granted.

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